The South-West Utilities decision did not implicate the filed rate doctrine because South-West did not seek damages based on speculation about what other rate might have been in effect had the LPSC been presented with the facts of that case. By contrast, the present case involves the filed rate doctrine because plaintiffs seek damages predicated precisely on such speculation.[5] If this Court permits plaintiffs to proceed with their damage claim, it would be creating an exception to the filed rate doctrine and allowing district courts to engage in ratemaking. Such a radical change in well-settled law should not be permitted.

II. Allowing Plaintiffs to Proceed With Their Claims Would Undermine The Important Principle of Uniformity of Ratemaking.

One of the primary reasons that certain industries, such as utilities and common carriers, are regulated is to prevent discrimination or favoritism by ensuring the uniformity of rates. The framers of the Louisiana Constitution recognized the need for uniformity when they (1) placed ratemaking authority in one constitutionally created body, the Louisiana Public Service Commission;[6] (2) directed that review of Commission orders initially take place in only one district court, the Nineteenth Judicial District Court; and (3) directed that only one appellate court, this Court, review the district court decisions relating to ratemaking. La. Const. art. IV, §21. The Louisiana legislature reinforced those principles when it directed that if new evidence was introduced in the appeal of a Commission order, the case was to be remanded to the Commission for further consideration. La. R.S. 45:1194.

Likewise, both Louisiana and federal courts have recognized the need for uniformity in ratemaking. Indeed, the United States Supreme Court has articulated this principle as a reason for the

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[5] To the extent that the plaintiffs are alleging that defendants' actions violate an order or regulation of the LPSC, or rates on file with the LPSC, those claims do not implicate the filed rate doctrine. The LPSC would have jurisdiction to consider such matters under La. R.S. 45:1196-1197.

[6] Article IV, section 21 of the Louisiana Constitution recognizes the authority of political subdivisions of the State to regulate utilities within their jurisdictions if the voters in the subdivision so elect.

filed rate doctrine. See, e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. at 579, 101 S.Ct. at 2931 ("It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act."). The need for uniformity also has been recognized as one of the underpinnings of the primary jurisdiction doctrine:

> "If, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question."

South-West Utils., Inc. v. South Central Bell Tel. Co., 339 So.2d at 428 (quoting Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-41, 27 S.Ct. 350, 355 (1907)).

As mentioned above, because the damages sought are predicated on the assumption that some different rate would have been in effect but for the alleged illegal conduct, the court must engage in ratemaking to award plaintiffs' the relief sought. The district court has neither the authority nor the expertise to engage in such an exercise. Moreover, if, as the Third Circuit's opinion suggests, any court can engage in ratemaking if the petition contains a cause of action other than a direct attack on a rate order, the uniformity of ratemaking would be destroyed. Any party unhappy with a filed rate could simply challenge it by cleverly pleading and raising an antitrust claim, a breach of contract action or some other cause of action. Under such circumstances, the "reasonableness" of rates " would fluctuate and vary dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question." 339 So.2d at 428.

CONCLUSION

The lower court's decision should not be allowed to stand. Plaintiffs should not be permitted, through artful pleading, to

seek damages based on the assumption that another, more reasonable set of rates might have been adopted under different circumstances. Such a result would destroy the filed rate doctrine, undermine the uniformity of rates and erode the ratemaking authority of the Louisiana Public Service Commission. For these reasons, South Central Bell respectfully requests that the applications for writ of certiorari or review filed by defendant-appellants be granted and that the decision of the Court of Appeal, Third Circuit, rendered in this matter be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have on this 13th day of April, 1992 served a copy of the foregoing pleading on counsel for all parties to this proceeding by sending same by United States mail, postage prepaid and correctly addressed.

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SUPREME COURT OF LOUISIANA

No. 92-C-0988 and No. 92-C-1001

THE DAILY ADVERTISER, RICHARD D'AQUIN,
MR. COOK LICENSING CORPORATION D/B/A MR. COOK
RESTAURANTS, COMPAGNIE VERMILION INCORPORATED,
COMPAGNIE CL-BM, LTD., and C. EARL EAGOOD, JR.,
Individually, and on behalf of all others similarly situated

(Plaintiffs-Appellees)

VERSUS

TRANS LA (A DIVISION OF ATMOS ENERGY CORPORATION D/B/A
ENERGAS COMPANY), LOUISIANA INTRASTATE GAS CORPORATION,
LIG CHEMICAL COMPANY, TUSCALOOSA PIPELINE COMPANY, and
TRANS-LOUISIANA INDUSTRIAL GAS COMPANY, INC.

(Defendants-Appellants)

ON WRIT OF CERTIORARI OR REVIEW FROM THE
COURT OF APPEAL, THIRD CIRCUIT, PARISH OF LAFAYETTE,
HONORABLE NED E. DOUCET, JR., HENRY L. YELVERTON
AND JEANETTE THERIOT KNOLL, JUDGES

ORIGINAL AMICUS CURIAE BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY

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SUPREME COURT OF LOUISIANA

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AND JEANETTE THERIOT KNOLL, JUDGES

ORIGINAL AMICUS CURIAE BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY

MAY IT PLEASE THE COURT:

BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company ("South Central Bell"), is engaged in, among other things, the business of providing telephone service throughout much of Louisiana. It is regulated in these activities by the Louisiana Public Service Commission ("LPSC" or "Commission"). As a regulated utility, South Central Bell has a strong interest in legal issues that affect the ratemaking process and regulatory law in Louisiana. South Central Bell, as amicus curiae, submits this brief in support of defendants-appellants Trans La (a division of Atmos Energy Corporation), Trans Louisiana Industrial Gas Company, Inc., Louisiana Intrastate Gas Corporation, LIG Chemical Company and Tuscaloosa Pipeline Company (collectively "defendants"). The decision of the Court of Appeal, Third Circuit

should be reversed, and this case dismissed for lack of subject matter jurisdiction.

INTRODUCTION

In its opinion dated February 4, 1992, the Louisiana Court of Appeal, Third Circuit, relying in part upon the decision in South-West Utils., Inc. v. South Central Bell Tel. Co., 339 So.2d 425 (La. App. 1st Cir. 1976), held that plaintiff's antitrust claims could be considered by the district court.[1] The Third Circuit's decision could seriously undermine settled principles of regulatory law if allowed to stand. South Central Bell takes no position with respect to the facts underlying Respondents' antitrust claims, but rather submits this brief for the sole purpose of addressing two points. First, allowing Respondents to litigate claims involving rates subject to the jurisdiction of the LPSC undermines both the Commission's jurisdiction and the important regulatory goal of uniformity and consistency in ratemaking. Second, the South-West Utilities decision is inapposite to the case at bar and, thus, was erroneously relied upon by the Court of Appeal, Third Circuit in its February 4, 1992 decision.

ARGUMENT

I. Allowing Respondents to Proceed With Their Claims Would Undermine The Important Principle of Uniformity of Ratemaking.

The primary issue presented to this Court is the extent of the LPSC's jurisdiction. Article IV, § 21(B) of the Louisiana Constitution grants the LPSC, in clear and unambiguous language, the authority to regulate "all common carriers and public utilities." That constitutional provision gives the Commission exclusive authority over the rates and services of utilities operating in Louisiana. Moreover, the Louisiana legislature has enacted statutes that have elaborated on the constitutional grant of authority. La. R.S. 45:302 grants the Commission the express

[1] Respondents alleged numerous claims in their suit and defendants filed exceptions to those claims. The court of appeal, however, only considered the exceptions with respect to the antitrust issue. See Daily Advertiser v. Trans-La, 594 So.2d 546, 547 n. 2 (La. App. 3d Cir. 1992).

authority to regulate the rates and services of intrastate natural gas pipelines and La. R.S. 45:1176 grants the LPSC jurisdiction to investigate the reasonableness of transactions between a regulated utility and its affiliates.[2] Respondents' claims relate to the rates and services offered by an intrastate pipeline company, as well as transactions between an intrastate pipeline company and its affiliates. Thus, it is indisputable that the Commission has jurisdiction over the claims raised in this case. Specifically, Respondents claims relate to the weighted average cost of gas ("WACOG") included as an element of the rates charged by intrastate pipelines companies. The Commission has issued general orders regarding the components of the WACOG in the past[3] and has instituted an investigation of the charges at issue in the present case. Neither Respondents nor the regulated applicants have contested the Commission's authority to do so.

Instead, Respondents contend that deference to the Commission's jurisdiction should not be given in the present case for two reasons: (1) the Commission did not hold formal hearings on the defendants' WACOG filings and (2) the Commission cannot grant the antitrust relief that Respondents seek. Contrary to the suggestions in Respondent's brief, the scope of the Commission's constitutionally granted jurisdiction is not limited by whether the Commission has held formal hearings on a matter or by whether the Commission is empowered to hear the antitrust claims that Respondents have pleaded. Within the sphere of rates and services, the LPSC's jurisdiction is exclusive. See, e.g., Louisiana Power & Light Co. v. Louisiana Pub. Serv. Comm'n, 523 So.2d 850, 856 (La. 1988). Indeed, as will be discussed below, this jurisdictional authority must be exclusive in order to preserve the principle of uniformity which is an essential element of ratemaking.

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[2] See Central Louisiana Elec. Co., Inc. v. Louisiana Pub. Serv. Comm'n, 373 So.2d 123 (La. 1979).

[3] See LPSC General Order (June 22, 1972).

The jurisdiction of the Commission is not circumscribed by the grant of jurisdiction to district courts pursuant to La. Const. art. V, § 16. This Court has already recognized that the constitutional grant of original jurisdiction to district courts does not include matters over which the Louisiana Constitution has elsewhere vested exclusive jurisdiction to administrative bodies such as the Commission. See Moore v. Roemer, 567 So.2d 75, 79-80 (La. 1990). Further, because the grant of jurisdiction to the Commission is constitutional, it cannot be circumscribed or limited by statutes. Cajun Elec. Power Co-Op., Inc. v. Louisiana Pub. Serv. Comm'n, 544 So.2d 362, 363 (La.), cert. denied, 493 U.S. 991 (1989); see also Central Louisiana Elec. Co., Inc. v. Louisiana Pub. Serv. Comm'n, 373 So.2d 123, 127-28 (La. 1979). Therefore, the state antitrust laws, La. R.S. 51:121, et seq., cannot be construed to limit the Commission's constitutionally granted jurisdiction.

One of the primary reasons that certain industries, such as utilities and common carriers, are regulated is to prevent discrimination by a utility against certain customers by ensuring the uniformity of rates. The framers of the Louisiana Constitution recognized the need for uniformity when they (1) placed ratemaking authority in one constitutionally created body, the Louisiana Public Service Commission;[4] (2) directed that review of Commission orders initially take place in only one district court, the Nineteenth Judicial District Court; and (3) directed that only one appellate court, this Court, review the district court decisions relating to ratemaking. La. Const. art. IV, § 21. The Louisiana legislature reinforced those principles when it directed that, if new evidence is introduced in the appeal of a Commission order, the case shall be remanded to the Commission for further consideration. La. R.S. 45:1194.

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[4] Article IV, section 21 of the Louisiana Constitution recognizes the authority of political subdivisions of the State to regulate utilities within their jurisdictions if the voters in the subdivision so elect.

Likewise, both Louisiana and federal courts have recognized the need for uniformity in ratemaking. The United States Supreme Court has explained: "It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the [Natural Gas] Act." Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579, 101 S. Ct. 2925, 2931 (1981). The need for uniformity has been recognized as one of the underpinnings of the primary jurisdiction doctrine:

> "If, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question."

South-West Utils., Inc. v. South Central Bell Tel. Co., 339 So.2d 425, 428 (La. App. 1st Cir. 1976)("South-West Utilities") (quoting Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-41, 27 S. Ct. 350, 355 (1907)).

Because the damages sought in this case are predicated on the assumption that some different rate would have been in effect but for the alleged illegal conduct, the district court must engage in ratemaking to award Respondents the relief they seek. The district court has neither the authority nor the expertise to engage in such an exercise. Moreover, if, as the Third Circuit's opinion suggests, a court can engage in ratemaking so long as the petition contains a cause of action other than a direct attack on a rate order, the uniformity of ratemaking would be destroyed. Any party unhappy with a filed rate could simply challenge it by pleading and raising an antitrust claim, a breach of contract action or some other cause of action. Under such circumstances, the "reasonableness" of rates "'would fluctuate and vary dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question.'" South-West Utilities, 339 So.2d at 428.

II. The South-West Utilities Decision Is Inapplicable to Respondents' Claims.

Respondents are customers of a gas utility who claim that the utility's filed rates were excessive and unreasonable because of alleged antitrust violations. These claims amount to nothing more than an attempt to litigate the reasonableness of rates previously on file with and accepted by the LPSC. In essence, Respondents are seeking a retroactive rate adjustment to compensate them for alleged excessive rates collected by the defendants during the relevant period. As discussed above, the Commission has exclusive jurisdiction of rates charged by intrastate natural gas pipelines. If Respondents are allowed to proceed with their damage claim, this Court would be permitting the district court to engage in ratemaking. Such a radical change in well-settled law should not be permitted.

In their brief, Respondents correctly observe that the court in South-West Utilities determined that the LPSC did not have exclusive jurisdiction over the claims raised by the plaintiff in that case. See Original Brief of Plaintiffs-Respondents, at 31. However, Respondents' reliance on the South-West Utilities decision to support their position demonstrates that they have entirely missed the point of that decision. In South-West Utilities, the plaintiff did not seek damages based on speculation about what different rate might have been in effect if the LPSC had been presented with the facts of the case. By contrast, in the present case, Respondents seek damages predicated precisely on such speculation.

Ostensibly following the South-West Utilities holding, the court of appeal in the present case erroneously concluded that the case could proceed because Respondents asserted violations of the antitrust laws as the cause of the alleged excessive rates. The court erred by assuming that the right of the Respondents to proceed in court turns solely on the nature of the cause of action that was pleaded. The extent of the LPSC's jurisdiction turns not

on the nature of the cause of action, but on the nature of the relief sought.

The decision in South-West Utilities did not involve an exception to the Commission's exclusive jurisdiction over rates. Rather, that case involved antitrust claims by competitors that did not challenge the reasonableness of rates subject to the Commission's exclusive jurisdiction. Accordingly, the court of appeal's reliance on the South-West Utilities decision was misplaced.

South-West Utilities involved allegations by a competitor that defendants were engaging in anti-competitive practices, which would give rise to damages for the lost going concern value of the business or the lost net future profits. The present case does not involve a competitor seeking lost going concern value or profits, but rather involves ratepayers seeking adjustments to rates previously filed with and accepted by the LPSC. Rather than supporting the Third Circuit's holding, the South-West Utilities decision expressly recognizes that the LPSC, not the courts, should determine the reasonableness of rates and services of utilities.

In South-West Utilities, the plaintiff, South-West Utilities, Inc. ("South-West"), was "an interconnect company engaged in the business of providing office communications equipment and service" to customers in Louisiana. 339 So.2d at 426. South-West named as defendants South Central Bell, American Telephone & Telegraph Company ("AT&T"), and Western Electric, a subsidiary of AT&T and a direct competitor of South-West. South-West alleged that the defendants

> engaged in and continued to engage in the practice of entering into contracts, agreements, conspiracies, and/or combinations in restraint of trade in the State of Louisiana and also of monopolization, attempts to monopolize and combinations and/or conspiracies to monopolize trade or commerce in the State of Louisiana, all in violation of the antitrust laws of the State of Louisiana . . . .

Id. More specifically, South-West contended that the defendants priced their office communications equipment below cost in order to

insulate them from competition. These below cost sales allegedly were subsidized by increased prices of their regulated service. According to South-West, these practices, along with others, effectively excluded South-West, a competitor, from the product market. Id. South-West sought treble damages in the amount of $7,879,914.00, representing alleged "severe economic injury to its business" in excess of $2.5 million. Id.

The defendants in South-West Utilities argued that the plaintiff was attempting to litigate the level of rates and the quality of service. Thus, according to the defendants, the matter should have been referred to the Louisiana Public Service Commission for consideration. Id. at 426-27. The district court agreed and dismissed the plaintiff's complaint on all grounds, except the count alleging unfair advertising. Id. at 427.

On appeal, the Court of Appeal, First Circuit reversed the district court, finding that plaintiff was not attempting to litigate rates and services. According to the court, the issue presented was "the applicability vel non of the doctrine of primary jurisdiction." Id. In its analysis, the court first recognized that one of the principal goals of the primary jurisdiction doctrine is to ensure uniformity of regulatory decisions. Id. at 428 (quoting Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 440-41, 27 S. Ct. 350, 355 (1907)). The court in South-West Utilities also recognized that the setting of rates is a matter within the "special administrative expertise" of the regulator. 339 So.2d at 428. The court stated: "We readily concede that rates and services of the various regulated industries in this state are indeed the responsibility of the Louisiana Public Service Commission ...." Id. at 429.

While recognizing the Commission's exclusive jurisdiction over rates, the court of appeal nevertheless disagreed with the district court's conclusion that South-West's complaint should be dismissed. The court of appeal explained:

> [W]e do not view plaintiff's efforts as an attempt to litigate rates and services. These factors, we feel, speak for themselves. Rather, plaintiff is here seeking to determine incidents of agreements and conspiracy to monopolize and restrain trade in specific contravention of our laws. These matters may in part be evidenced by particular rates, but by no means will rates alone be the sole criteria upon which such allegations will stand proved.

Id. The court recognized, however, that, if the plaintiff were attempting to "litigate rates and services," then the reasonableness of those rates and services should be determined by the Louisiana Public Service Commission:

> We can easily appreciate in matters involving the determination of fair rates and services, in order that regulated industries may reasonably prosper and expand without taking undue advantage of monopolistic situations, that the Public Service Commission is eminently more qualified to make such decisions in contrast to the courts.... It would indeed be an inefficient use of the courts and the Commission not to have the benefit of the Commission's expertise in such instances. Furthermore, the need for uniformity of rates dictates by the very essence of its nature a result that could not be otherwise.

Id. Thus, the court in South-West Utilities properly concluded that the LPSC, and not the courts, should determine the reasonableness of particular rates. The holding in South-West Utilities -- that the plaintiff's antitrust claims should not be dismissed -- was based on the court's conclusion that the plaintiff was not challenging the reasonableness of the rates charged by the defendants.

The distinction between the South-West Utilities case and the case at bar is readily apparent from the allegations and relief sought by the respective plaintiffs.[5] In South-West Utilities, the plaintiff, a competitor, sought to recover damages for alleged

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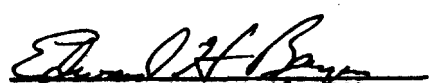
[5] Another distinction between the present case and South-West Utilities is that, in the latter case, the plaintiffs pleaded not only an injury to themselves, but also injury to competition. Under the Louisiana antitrust laws, like their federal counterparts, allegations and proof of injury to competition, as distinguished from mere injury to plaintiffs, is an essential element of a cause of action. See, e.g., Louisiana Power & Light Co. v. United Gas Pipe Line Co., 518 So.2d 1050, 1054 (La. App. 4th Cir.), writ denied, 523 So.2d 232 (La. 1989). In the present case, although plaintiffs have asserted that they have paid higher prices for gas than they should have, they fail to suggest how competition was injured.

economic injury to its business, resulting from anti-competitive behavior. Such damages would not have been measured by taking the difference between a filed rate and a hypothetical rate that supposedly would have been in place absent the illegal acts. Rather, damages would have been measured by either the lost going concern value of the business or the lost net future profits on sales that plaintiff could have made but for defendant's allegedly illegal activity. In this case, Respondents are not competitors of the defendants -- they are customers. Therefore, as ratepayers, the measure of the damages that Respondents seek to recover would be the difference between (1) what they were charged during the period at issue, and (2) what they should have been charged had the defendants not allegedly engaged in the challenged conduct. Under these circumstances, only the LPSC has jurisdiction over Respondents' claims.

CONCLUSION

Respondents should not be permitted, through artful pleading, to seek damages based on the assumption that another, more reasonable set of rates might have been adopted under different circumstances. Such a result would undermine the uniformity of rates and erode the ratemaking authority of the Louisiana Public Service Commission. For these reasons, South Central Bell respectfully requests that the decision of the Court of Appeal, Third Circuit be reversed, and this case dismissed for lack of subject matter jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have on this 18th day of November, 1992 served a copy of the foregoing pleading on counsel for all parties to this proceeding by sending same by United States mail, postage prepaid and correctly addressed.

Edmund K. Berger

CERTIFICATE OF SERVICE

I, Ashton Hardy, hereby certify that on this 14th day of October, 1994, I caused to be mailed postage-prepaid, by U.S. first class mail, a copy of the foregoing **"Reply of Radiofone, Inc."** to the following:

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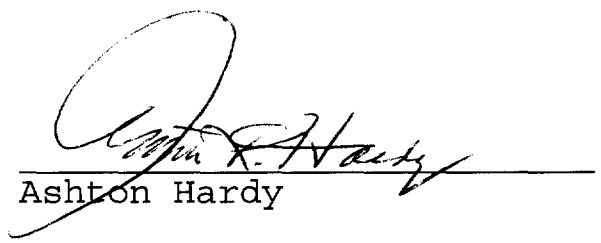

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